No. 14,847

IN THE

United States Court of Appeals

For the Ninth Circuit

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE
CORP., LIMITED, a Corporation,
Appellant,

vs.

INDEPENDENT MILITARY TRANSPORT
ASSOCIATION, a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF.

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Table of Authorities Cited

Cases

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The general principles applicable to the case are not in dispute. Both sides agree that the burden was upon appellee to prove by a preponderance of the evidence that an employee of the insured was guilty of theft. Both sides agree that "preponderance of evidence" means "probability of Truth". (*Archer v. Fox,* D. C. Ky., 134 F. Supp. 27, 29.) Both sides agree that "circumstantial evidence may outweigh in convincing force, both the strongest of disputable presumptions (sometimes said to be the presumption of innocence) and direct evidence as well". (*Scott v. Burke,* 39 Cal. 2d 388, 398, 247 P. 2d 313.) And both sides accept

the law thus declared in *Sanders v. MacFarlane's Candies,* 119 Cal. App. 2d 497, 500, 259 P. 2d 1010:

> " 'Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn in any given case, is a question of fact for the jury.' (*Blank v. Coffin,* 20 Cal. 2d 457, 461.) An inference cannot be based on mere possibilities; it has been held that it must be based on probabilities. (32 C.J.S. 1132, 1133; *Gardner v. Seymour,* 27 Wn. 2d 802, 180 P. 2d 564, 569; *Kenwood Lbr. Co. v. Illinois Cent. R. Co.,* 65 F. 2d 663, 665.) This accords with the general principle, enunciated more than once by this court, that in civil cases the rule of decision is a rule of probability only. (*Spolter v. Four-Wheel Brake Serv. Co.,* 99 Cal. App. 2d 690, 693, 222 P. 2d 307; *Wirz v. Wirz,* 96 Cal. App. 2d 171, 175, 214 P. 2d 839, 15 A.L.R. 2d 1129.) 'It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the *only* conclusion that can fairly or reasonably be drawn therefrom . . .' (*Katenkamp v. Union Realty Co.,* 36 Cal. App. 2d 602, 617, 98 P. 2d 239.) The plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly derivable from the facts proved. (*Vaccarezza v. Sanguinetti,* 71 Cal. App. 2d 687, 692, 163 P. 2d 470; *Spolter v. Four-Wheel Brake Serv. Co., supra,* at p. 694.)"

The disagreement of the parties is over the legal effect of the evidence. The position of appellant is that the evidence is too shadowy and too speculative

to brand as a thief any employee of the insured, and that the finding of the lower court to the contrary is therefore clearly erroneous. The appellee, of course, is persuaded that the evidence is substantial enough and probable enough to brand as a thief one of the employees of the insured, and that the finding of the lower court to that effect is not erroneous at all.

It is said in appellee's brief (p. 18) that the case of closest approach is *Durham Pepsi-Cola Bottling Co. v. Maryland Cas. Co.,* 228 N.C. 411, 45 S.E. 2d 375, where theft of money from a safe was involved. Factually, the case is remote. There it is said:

> "Of the persons other than employees who now knew or had previously known the combination of the safe all were examined and the evidence tended to show that they were not in Raleigh at the time, did not participate in the affair, and knew nothing of it.
>
> The plaintiff introduced expert evidence tending to show that the safe was of such construction and the combination of such character that it could have been opened only by one knowing the combination, or by the use of external force, as by 'blowing' or 'burning' into it; that the chance of opening it by working the combination was negligible for anyone who did not know it."

Since appellant must abide the reaction of this court to the record, elaboration of arguments is not indicated.

CONCLUSION.

Therefore, appellant again respectfully submits that the judgment appealed from should be reversed with directions to the trial court to enter judgment for appellant.

Dated, San Francisco, California,
March 5, 1956.

Thomas E. Davis,
Attorney for Appellant.